



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 28, 1998

Mr. Charles M. Allen, II
Legal Office
Richardson Police Department
P.O. Box 831078
Richardson, Texas 75083-1078

OR98-1781

Dear Mr. Allen:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. We assigned your request ID# 117333.

The City of Richardson (the "city") received a request for "all documents pertaining to past disciplinary action taken against Richardson Police Officer William E. Phillips." You have released some of the requested information. You contend that the requested information is excepted from disclosure pursuant to sections 552.101 and 552.103 of the Government Code.

Section 552.101 excepts from disclosure "information deemed confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 143.089 of the Local Government Code contemplates two different types of personnel files, one that the police department is required to maintain as part of the police officer's civil service file, and one that the police department may maintain for its own internal use. Local Gov't Code § 143.089(a), (g).

Section 143.089(g) provides:

A fire or police department may maintain a personnel file on a fire fighter or police officer employed by the department for the department's use, but the department may not release any information contained in the department file to any agency or person requesting information relating to a fire fighter or police officer. The department shall refer to the director or the director's designee a person or agency that requests information that is maintained in the fire fighter's or police officer's personnel file.

In *City of San Antonio v. Texas Attorney Gen.*, 851 S.W.2d 946 (Tex. App.--Austin 1993, writ denied), the court addressed a request for information contained in a police officer's

personnel file maintained by the city police department for its use and addressed the applicability of section 143.089(g) to that file. The records included in the personnel file related to complaints against the police officer for which no disciplinary action was taken. The court determined that section 143.089(g) made these records confidential. *City of San Antonio*, 851 S.W.2d at 949. In cases in which a police department takes disciplinary action against a police officer, it is required by section 143.089(a)(2) to place records relating to the investigation and disciplinary action in the personnel files maintained under section 143.089(a). Such records may not be withheld under section 552.101 of the act. Local Gov't Code § 143.089(f); Open Records Decision No. 562 (1990) at 6.

We are unable to determine whether the documents you submitted to us for review are part of the files maintained by the police department under section 143.089(g). If these documents are part of the section 143.089(g) files, the city must withhold these documents. However, the documents show that the internal affairs investigations resulted in disciplinary actions against the officer. Therefore, "any record, memorandum, or document relating to" one of the four disciplinary actions listed in subchapter D of chapter 143 must be placed in the personnel files maintained by the civil service commission under section 143.089(a).¹ Information maintained in a police officer's civil service personnel file must generally be released to the public upon request, unless some provision of chapter 552 of the Government Code permits the civil service commission to withhold the information. Local Gov't Code § 143.089(f); Gov't Code §§ 552.006, .021; Open Records Decision No. 562 (1990) at 6 (construction of Local Gov't Code § 143.089(f) provision requiring release of information as required by law).

We now address your other claims in the event that the documents submitted to this office for review are not part of the police officer's section 143.089(g) files. Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. The city has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. The city must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 (1986) at 4. Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue

¹A written reprimand is not one of the disciplinary actions listed in subchapter D of chapter 143 of the Local Government Code.

the governmental body from an attorney for a potential opposing party.² Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 (1989) at 5 (litigation must be “realistically contemplated”). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Nor does the mere fact that an individual hires an attorney and alleges damages serve to establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983) at 2. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986) at 4.

You have submitted a letter from an attorney which states that he is representing a certain individual and is investigating a shooting incident. The attorney has not threatened to sue the city. *See* Open Records Decision No. 361 (1983) at 2. Furthermore, you state that another attorney “has met with the City Attorney and stated that a demand letter pursuant to City Charter requirements is being drafted in anticipation of filing civil suit.” In Open Records Decision No. 638 (1996), we concluded that a governmental body may establish that litigation is reasonably anticipated by showing that (1) it has received a claim letter from an allegedly injured party or his attorney and (2) the *governmental body* states that the letter complies with the notice of claim provisions of the Texas Tort Claims Act (TTCA) or applicable municipal statute or ordinance. After considering your arguments, we conclude that you have failed to meet the requisite showing that litigation is reasonably anticipated and, therefore, you may not rely on section 552.103 to withhold the information from the requestor.

The information includes information excepted from public disclosure by sections 552.117 and 552.130 of the Government Code. Section 552.117(2) excepts from public disclosure a peace officer’s home address, home telephone number, social security number, and information concerning whether the peace officer has family members. Thus, you must withhold the information we have marked under section 552.117(2).

Section 552.130 provides in relevant part as follows:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

(1) a motor vehicle operator’s or driver’s license or permit issued by an agency of this state[.]

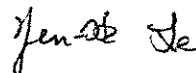
²In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982), and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

We have marked the information you must withhold pursuant to section 552.130.

Lastly, the incident reports contain social security numbers. Federal law may prohibit disclosure of the social security numbers included in this request for records. A social security number is excepted from required public disclosure under section 552.101 of the act in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), *if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. See Open Records Decision No. 622 (1994).* Based on the information you have provided, we are unable to determine whether the social security numbers at issue are confidential under this federal statute. We note, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Therefore, prior to releasing any social security number information, the city should ensure that the information is not confidential under this federal statute.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/nc

Ref.: ID# 117333

Enclosures: Marked documents

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(w/o enclosures)